SABAH BANK BERHAD

v.

HO JUAN HUA & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[SUIT NO. T. 111 OF 1988]
7 JUNE 1993

GUARANTEE: Overdraft facilities - Guarantee executed by directors - Overdraft facilities given before execution of guarantee - Whether there was consideration for the execution of the guarantee - Overdraft facilities utilised by a company other than the company referred to in the guarantee - Whether guarantors liable - Company for whom repayment was guaranteed wound-up within six months of creation of debenture - Whether s. 294 Companies Act 1965 applicable.

The plaintiffs' claimed against the defendants the sum of RM687,785.70 which one Emporioum Man Nung Sdn. Bhd. (the Company) had failed to repay the plaintiffs and which repayment the defendants had guaranteed under a written guarantee dated 12 April 1985. The plaintiffs obtained judgment in default against the defendants and the defendants applied to set aside the default judgment.

The defendants claimed that there was no consideration for the guarantee because the overdraft facilities were given before the execution of the guarantee and there was no evidence that money was released after the date of the guarantee. The defendants also contended that the overdraft facilities were utilised by another company other than the company referred to in the guarantee.

The defendants finally contended that the company for which they guaranteed repayment was wound-up within six months of the creation of a debenture in favour of the plaintiffs and as such attracted the operation of s. 294 of the Companies Act 1965 (the Act), which limited the liability of the company for only the amount of the loan actually released after or at the time of the execution of the debenture and for interest at 5% only.

The defendants argued that they were entitled to the benefit of this limitation of liability and that the default judgment was consequently invalid as it included advances made before the execution of the debenture and further that it included interest above the 5% rate.

Held:

[1] The circumstances surrounding the execution of the guarantee, namely the existence of a previous guarantee for a smaller facility, the request for a larger facility and the execution of the guarantee for a larger sum following the granting of a larger credit facility all go to show that the parties intended the guarantee to be for past as well as for future advances.

[2] There was money disbursed before and after the execution of the guarantee and there was evidence to infer, the defendants being directors of the Company, that the loan was at their desire. There was therefore consideration for the guarantee.

[3] The guarantee provided for the defendants to be liable for all sums of money owing by the Company on any account whatsoever and the defendants by agreeing to open the account for the use of the other company and by signing the mandate to the plaintiffs had sanctioned the arrangement for the operation of the said account. It was therefore in the contemplation of the defendants, when they signed the guarantee, that the guarantee was to include the amount owing under the said account.

[4] The amount due from the Company to the plaintiffs were for overdraft facilities in respect of the accounts operated by the Company and not for the amount due under the debenture. Section 294 of the Act was only relevant if the plaintiffs had sued on or acted under the debenture to recover any moneys due thereunder. As the plaintiffs had sued on the guarantee, the defendants reliance on s. 294 of the Act was misconceived.

[Defendants' application to set aside judgment in default dismissed with costs].

Cases referred to:

Hock Hua Bank (Sabah) Berhad v. Labuan Electronic Centre Sdn. Bhd. & 5 Ors. (High Court in Borneo at Kota Kinabalu, Civil Suit No. K494 of 1985) ***(refd)***

Heng Cheng Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 267 ***(refd)***

Perwira Habib Bank Malaysia Bhd. v. MET Sdn. Bhd. & 3 Ors. [1988] 2 CLJ 480 ***(refd)***

Perwira Habib Bank Malaysia Bhd. v. Fast Travel (M) Sdn. Bhd. & Ors. [1988] 3 MLJ 210 ***(refd)***

Development & Commercial Bank Bhd v. Syarikat Farmco Sdn Bhd & Ors. [1988] 3 MLJ 275 ***(refd)***

Pacific & Orient Insurance Co. Sdn. Bhd. v. Gimstern Corportion (M) Sdn. Bhd. & Sim Thong Gim & 4 Ors. [1989] 2 CLJ 721 ***(refd)***

Tan Chong & Sons Motor Company Ltd. v. Yang Chin Lang [1967] 1 MLJ 125 ***(foll)***
Chew Soon Tat v. Malaysia National Insurance Sdn. Bhd. [1977] 1 MLJ 241 ***(cit)***
The Hongkong and Shanghai Banking Corp. v. Syarikat United Enterprise Sdn. Bhd. & Anor. (High Court, Tawau, Civil Suit No. T. 275 of 1987) ***(refd)***

Legislation referred to:
Companies Act 1965, s. 294

For the plaintiffs - Paul Kan; M/s. Paul Kan & Co.
For the defendants - Clement Skinner; M/s. Skinner, Lind, Robertson, Willie, Wong & Chin

JUDGMENT

Ian H.C. Chin JC:
I. *History*

The plaintiffs took out a writ against the defendants on 18 November 1988. The writ was served on the defendants by way of advertisement in two newspapers respectively on 9 November 1989 and 10 November 1989. Judgment in Default of Appearance was entered on 21 December 1989 ("Default Judgment"). The defendants applied by a summons in chambers dated 12 November 1992 to set aside the Default Judgment on the ground that they have a good defence on merits. The affidavits filed in support of the application are (1) the joint affidavit of the defendants sworn to on 31 October 1992, (2) the affidavit of the first defendant sworn to on 9 February 1993, (3) the affidavit of Chong Chee Kong affirmed on 17 May 1993 and (4) the affidavit of the first defendant affirmed 18 May 1993. The application was opposed by the plaintiffs and for the purpose, the following affidavits were filed: (1) the affidavits of Lawrence Chung Thau Yin sworn to on 29 December 1992 and on 13 February 1993 and (2) the affidavit of Bernard Chan Eng Beng sworn to on 24 May 1993. I heard arguments on 4 January 1993, 16 February 1993 and 25 May 1993 and reserved my ruling which I now deliver. The hearing was staggered to enable the defendants to gather documentary evidence.

II. *Statement of Claim*

The plaintiffs' claim against the defendants is for the sum of RM687,785.70 together with agreed interest which one Emporioum Man Nung Sdn. Bhd. ("the Company") had failed to repay the plaintiffs and which repayment the defendants, among others, had guaranteed under a guarantee made 12 April 1985 ("the Guarantee").

III. *Defendants' Contentions*

The defendants maintain that there was no consideration for the Guarantee because the overdraft facilities were given before the execution of the Guarantee and there is no evidence that money was released after the date of the Guarantee. The defendants also contend that the overdraft facilities were utilized by another company other than the Company referred to in the Guarantee. The defendants finally contend that the Company for which they guaranteed repayment was wound up within 6 months of the creation of a debenture in favour of the plaintiffs and thus attracts the operation of s. 294 of the Companies Act, 1965, which limits the liability of the Company for only the amount of the loan actually released after or at the time of the execution of the debenture and for interest at 5% only; this limitation of liability, the defendants argued, they are entitled to the benefit of and the Default Judgment was consequently invalid as it included advances made before the execution of the debenture and that it included interest above the 5% rate. I will now deal with the contentions, one at a time, and give my decisions. But before doing that a summary of the undisputed or indisputable facts is made.

IV. *Facts of Case.*

The Company's dealings with the plaintiffs started in 1983 in Tawau when credit facilities were, pursuant to the plaintiffs' offer dated 22 February 1983 (Exhibit "B"), given to the Company for which the defendants guaranteed repay-ment of the principal sum of RM250,000 by a guarantee dated 27 May 1983 (Exhibit "D"). At all relevant times the defendants, together with 5 others, were directors of the Company. The directors then decided to expand its busi-ness to Sandakan which business "was to be owned by a separate legal entity to be called Emporium Man Nung (Sandakan) Sdn. Bhd.". For that purpose, the then deputy managing director, one Chong Chee Kong, met the then manager of the Sandakan branch of the plaintiff's bank and was advised by the said manager "that as Emporium Man Nung (Sandakan) Sdn. Bhd. had not yet been incorporated, any account opened should be under the name of [the

Company] pending the incorporation of Emporium Man Nung (Sandakan) Sdn. Bhd.". As a result of that meeting, the directors of the Company, including the defendants, by a resolution dated 29 November 1983 ("CCK-l"), resolved to open an account with the Sandakan branch of the plaintiff's bank. The Sandakan account, numbered 30360, ("said account") of the Company was thereafter opened. Emporium Man Nung (Sandakan) Sdn. Bhd. was incorporated on 21 January 1984 and, to the knowledge of the Sandakan manager of the plaintiff's bank, commenced business in June 1984. Pay-in slips for the month of January 1985 showed that moneys were paid in by Emporium Man Nung (Sandakan) Sdn. Bhd. into the said account. There is no evidence that any money had been paid out of the said account for the purpose or benefit of Emporium Man Nung (Sandakan) Sdn. Bhd. The Company applied and the plaintiffs on 18 March 1985, by a letter ("E-l"), approved additional credit for the Company up to the maximun amount of RM700,000. For this RM700,000, the defendants, among others, executed the Guarantee ("F"). It is stated in the said plaintiffs' offer that the offer "is to supersede and cancel" the plaintiffs' previous letter of offer ("B"). It is also stated in the said offer ("F") that the security for the loan facility shall be (1) a second charge over certain lands, (2) a debenture and (3) a joint and several guarantee of all the directors. One purpose of the loan was stated in the said offer to be for the Company's "additional working capital for their existing business and to facilitate business expansion to Tawau and Sandakan". For ease of reference the relevant parts of the Guarantee, which was executed pursuant to the approval of the additional credit, are reproduced here:

> 1. In consideration of your making or continuing advances or otherwise giving credit or affording banking facilities (including *inter alia* the issue of guarantees by you and your acceptance by the Principal as herein after defined in favour of third parties) for as long as you shall think fit to Emporium Man Nung Sdn. Bhd. (hereinafter called the "the Principal") we, the undersigned, hereby agree to pay to you on demand all sums of money which are now or shall at any time be owing to you anywhere on any account whatsoever whether from the Principal solely or from the Principal jointly with any other person or persons or from any firm in which the Principal may be a partner including the amount of notes bills discounted or paid and other loans, credits or advances made to or for the accommodation or at the request either of the Principal solely or jointly or of any such firm as aforesaid or for any money for which the Principal may be liable as surety or in any other way whatsoever together with in all the cases aforesaid all interest, discount and other bankers' charges including ...
>
> 2. This guarantee ... shall be a continuing security ...
>
> 12. This guarantee shall be in addition to and not in substitution for any other guarantee for the Principal given by all or any of us to you.

The plaintiffs adduced bank statements (Exhibits "Gl", "G2", "G3" and "G4") showing the money advanced by the plaintiffs to have been disbursed before and after the date of the Guarantee and to have been utilized by the Company in Tawau and in Sandakan through the respective bank accounts under the name of the Company. The debenture (Exhibit "HJH-3") was only issued by the Company on 25 October 1985 (and not 21 March 1985 as contended by the defendants). A receiver was, pursuant to the said debenture and pursuant to another unexhibited debenture issued on 12 April 1985 (see the letter Exhibit "HJH-9"), appointed on 18 January 1986 and a sum of RM68,000 was realized by the receiver under the said debenture. The Company was ordered to be wound up by an order of the Court made on 27 January 1986 upon the petition of another creditor. When the Company failed to repay the loan it resulted in the action and Default Judgment herein against the defendants. Those are the brief facts of this case. I will now turn to the contentions of the defendants.

V. *Conclusions*.

A. *Consideration*.

Counsel for the defendants argued that because it is stated in the plaintiffs' offer for the said additional credit dated 18 March 1985 (Exhibit "E-l") that the offer "is to supersede and cancel" the plaintiffs' previous letter of offer (Exhibit "B"), the Guarantee is for future advances only and not for past advances. It is not in issue that the said Default Judgment included sums advanced before the execution of the Guarantee and it cannot be argued otherwise, on account of the statements produced (Exhibits "Gl", "G2", "G3" and "G4"), that the

Default Judgment also included sums advanced after the execution of the Guarantee. Whether the Guarantee covers past advances as well as future advances will of course depend on the intention of the parties as can be gathered from the language they used in the Guarantee and is a question of the quantum of liability. I have in the unreported case of *Hock Hua Bank (Sabah) Berhad v. Labuan Electronic Centre Sdn. Bhd. & 5 Ors.* (High Court in Borneo at Kota Kinabalu, Civil Suit No. K494 of 1985) set out the cases where the Courts had held that the various guarantees concerned were for an existing as well as future debts and these cases were (1) *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267; (2) *Perwira Habib Bank Malaysia Bhd. v. MET Sdn. Bhd. & 3 Ors.* [1988] 2 CLJ 480; (3) *Perwira Habib Bank Malaysia Bhd. v. Fast Travel (M) Sdn. Bhd. & Ors.* [1988] 3 MLJ 210; (4) *Development & Commercial Bank Bhd v. Syarikat Farmco Sdn Bhd & Ors.* [1988] 3 MLJ 275 and (5) *Pacific & Orient Insurance Co. Sdn. Bhd. v. Gimstern Corportion (M) Sdn. Bhd. & Sim Thong Gim & 4 Ors.* [1989] 2 CLJ 721. The wordings of paragraph 1 of the Guarantee are, word for word, the same as those guarantees referred to in the said cases (1) to (4) where the Court held those guarantees were for past as well as for future advances. I am also of the opinion that the Guarantee was for past as well as for future advances. This is obvious when the circumstances surrounding the execution of the Guarantee are considered and these are, the existence of a previous guarantee for a smaller facility, the request for a larger facility and the execution of the Guarantee for a larger sum following the granting of a larger credit facility; all of which go to show that the parties intended the Guarantee to be for past as well as for future advances. The case of *Tan Chong & Sons Motor Company Ltd. v. Yang Chin Lang* [19671 1 MLJ 125 is authority for saying that the surrounding circumstances attending the execution of the Guarantee can be considered. There is therefore no merit in this proposed defence of the defendants. What was 'superseded or cancelled' was not the previous guarantee but the offer relating to the said previous guarantee and it is expressly provided in clause 12 of the Guarantee that the Guarantee "shall be in addition to and not in substitution for any other guarantee". I was referred by Counsel for the defendants to the case of *Chew Soon Tat v. Malaysia National Insurance Sdn. Bhd.* [1977] 1 MLJ 241 but unfortunately the wordings of the guarantee in that case are not reproduced in the judgment and the wordings of the guarantee was remarked by that Court to be "loose". I am of the opinion that that case is not laying down any principle of law that all guarantees can only be in respect of liabilities incurred after the date of the guarantee. That is a question of quantum which in turn depends on the wordings of each particular guarantee. In so far as liability is concerned, even past advances can be good consideration provided that the past advances were at the "desire" of the guarantors. I have, in this regard, dealt with the relevant law and cases at length in the unreported case of *The Hongkong and Shanghai Banking Corp. v. Syarikat United Leong Enterprise Sdn. Bhd. & Anor.* [In the High Court in Borneo at Tawau, Civil Suit No. T.275 of 1987] and I do not see any need to repeat here what I have said in that case. Suffice for me to state that in this case there was money disbursed before and after the execution of the Guarantee and there is evidence to infer, the defendants being directors of the Company, that the loan was at their desire. There is therefore consideration for the Guarantee. The proposed defence could not succeed.

B. *Utilization of Advances.*

The second contention of the defendants is that part of the advances under the Guarantee was utilized by the Company's sister company called Emporium Man Nung (Sandakan) Sdn. Bhd. which the Guarantee does not cover. The plaintiffs adduced bank statements (Exhibits "Gl", "G2", "G3" and "G4") showing the money to have been utilized by the Company in Sandakan and in Tawau, the Company having maintained the said account with the plaintiffs' bank in Sandakan and another account with the plaintiffs' bank in Tawau and with the Company utilizing the said loan facility through the said two accounts. Even assuming that because Emporium Man Nung (Sandakan) Sdn. Bhd. had on occasions to pay money in to the said account and because of such payment there could be payment out of the said account for the purposes and benefit of Man Nung (Sandakan) Sdn. Bhd., the quantum of liability under the Guarantee remains unaffected, and irrespective thereof, the defendants are still liable for the amount due under the said account. In the first place, the Guarantee provides for the defendants to be liable for

"all sums of money which are now or shall at any time be owing to [the plaintiffs] anywhere on any account whatsoever" by the Company. In the second place, the defendants, by agreeing to the resolution of 29 November 1983 ("C-3") to open the said account for the use of Emporium Man Nung (Sandakan) Sdn. Bhd. (which came about, the defendants allege, after the meeting between the said deputy managing director and the said branch manager) and by signing the mandate ("C2") to the plaintiffs, must surely have agreed to the said account being used in the manner alleged by the defendants. Therefore, at the time of execution of the Guarantee on 12 April 1985, the defendants were fully aware that the said account was so used, and in fact they had allowed the said account to be so used. The defendants did not in any of the affidavits filed herein state that they did not agree to the manner in which the said account had been operated; that they did not is obviously because they have sanctioned the arrangement. That being the case it must be in the comtemplation of the defendants, there being no dispute at all as to the evidence in this regard, when they signed the Guar-antee that the Guarantee is to include the amount owing under the said account. There is, therefore, no merit in this proposed defence.

C. *Section 294 of Companies Act, 1965.*

The final contention of the defendants is that the Default Judgment herein included monies that were released subsequent to the execution of a debenture by the Company on 25 October 1985 and included interest at 13% and 14%. See paragraphs 7 and 17 of the joint affidavit of the defendants. The judgment, according to Counsel for the defendants, is therefore defective and unenforceable because s. 294 only allowed the plaintiffs to recover moneys released at and subsequent to the execution of the debenture and interest at 5% p.a. only. The said debenture (Exhibit "HJH-3"), was in fact made on 25 October 1985 and not 21 March 1985. But there appears to be another debenture issued on 12 April 1985 as the letter, Exhibit "HJH-9", states so. The Company was ordered to be wound up on 27 January 1986. I will now examine s. 294 of the Companies Act, 1965, which for ease of reference I reproduce here:

> 294. A floating charge on the undertaking or property of the company created within six months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of five per centum per annum.

The said s. 294 of the Companies Act, 1965, is only relevant if the plaintiffs sue on the debenture or acted under the debenture to recover any moneys due thereunder. But it is not the case here. The plaintiffs are suing on the Guarantee. I agree with Counsel for the plaintiffs that clause 7 of the Guarantee expressly provides for the Guarantee not to be in any way prejudiced or affected by the said debenture. Therefore, the alleged invalidity of the debenture under s. 294 of the Companies Act, 1965, does not in any way reduced the amount which the defendants are liable to pay the plaintiffs under the Guarantee. If the Guarantee was in respect solely of the moneys due under the debenture then the defendants would have to be allowed the benefit of s. 294 of the Companies Act, 1965. But the Guarantee is in respect of, to quote from the Guarantee, "all sums of money which are now or shall at any time be owing ... anywhere on any account whatsoever". The amount due from the Company to the plaintiffs were for overdraft facilities in respect of the said two accounts operated by the Company and not for the amount due under the debenture. There is therefore also no merit in this proposed defence of the defendants.

In the premises I dismiss the defendants' application with cost to be taxed.